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murrer to evidence by plaintiff in error, it is of opinion that verdict is without evidence to support it, or is plainly contrary to evidence.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 620, et seq.]

16. Sales (§ 387*)—Seller's Action—Jury Question—Abandonment of Contract.—In seller's action for buyer's failure to accept ordered goods, whether contract had been abandoned by both parties was for jury.

17. Sales (§ 127*)—Rescission—Election.—A breach of contract does not effect a rescission, without the assent of the other party.

18. Sales (§ 371*)—Action by Seller—Burden of Proof—Tender.—Seller, suing for buyer's refusal to accept ordered goods, must show that its tender had been made in good faith, with a present ability and willingness to perform, and that it had kept itself ready to perform whenever called upon by buyer during life of contract.

19. Sales (§ 176 (1)*)—Breach by Buyer—Waiver by Seller.—Seller could not recover for buyer's refusal to accept ordered goods, after having waived its rights against buyer growing out of such breach.

20. Sales (§ 175*)—Performance—Buyer's Refusal to Accept.—Where contract required seller to ship or store goods seller had agreed to manufacture for buyer, seller was relieved of such duty upon buyer's refusal to accept sample conforming to contract, for manufacture, after notice that buyer would not accept, would have been idle performance.

Error to Circuit Court of City of Norfolk.

Action by the Ætna Hosiery Company against the Norfolk Hosiery & Underwear Mills Company. Judgment for plaintiff, and defendant brings error. Affirmed.

H. W. Anderson, of Richmond, and *Tazewell Taylor*, of Norfolk, for plaintiffs in error.

R. R. Hicks, of Norfolk, for defendant in error.

PAMPLIN *v.* NORFOLK & W. RY. CO.

Jan. 16, 1919.

[98 S. E. 51.]

1. Railroads (§ 113 (1)*)—Highways—Location—Change of.—The consent of the board of supervisors, under Code 1904, § 1294b, subsec. 3, to a change of location of a public highway by a railroad com-

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

pany, does not shield the company from liability for such damages as the change may cause to the owner or occupants of any land.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 63; 11 Va.-W. Va. Enc. Dig. 554; 12 Va.-W. Va. Enc. Dig. 943-945.]

2. Railroads (§ 113 (8, 9)*)—Injuries to Property—Right of Way—Conveyances.—Conveyance to a railroad company of a right of way for its proposed railroad vested in the company the same rights as though the land had been acquired by condemnation, and the grantor cannot recover for any damages to remainder of his land resulting from a proper construction, use, and operation of the property conveyed.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 546.]

3. Eminent Domain (§ 112*)—Award—Damages Included.—Where part of a tract of land is taken by condemnation proceedings for a railroad right of way, the award includes damages to the residue of the tract which are due to the construction and operation of the railroad on a grade different from the natural surface of the land.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 546.]

4. Railroads (§ 113 (2)*)—Injuries from Construction—Embankment.—Though a railroad company, on condemning a right of way, is required to file a profile showing the cuts and fills, yet, where the company was granted a right of way over land, it was not liable for damages, because its road was constructed on an embankment, where the embankment did not deprive the adjacent land of support, or interfere with the flow of running streams, etc.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 546.]

5. Railroads (§ 113 (8, 9)*)—Injuries from Construction—Effect of Conveyance.—A deed to a railroad company for a right of way, though a conveyance in fee, held not an ordinary conveyance as to a grantee of land in fee, subject to the maxim "*sic utere tuo ut alienum non lædas*," but a conveyance of the right of way for railroad purposes, entitling the company to build its road on an embankment.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 429.]

6. Railroads (§ 67 (1)*)—Deeds—Construction—Drawing of Deed.—Where a deed to a railroad company was drawn by the grantee, the rule that any doubt as to the true meaning should be resolved against the draftsman has merely to do with the meaning of ambiguous language, and cannot affect the rules of law applicable to the construction of the deed where there is no ambiguity.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 421.]

7. Notice (§ 5*)—Constructive Knowledge—Contents of Deed.—Where a deed to a railroad company of a right of way, which was

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

prepared by the company, disclosed the profile of the proposed line on a plan which was made a part of the deed, held, that the grantor was charged with constructive notice of what was shown on the plan.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 420.]

8. Railroads (§ 113 (8, 9)*)—Injuries from Construction—Right of Way Deed—Effect.—Where plaintiff granted a railroad company a right of way over a particular parcel, the grant did not operate as a release of plaintiff's right to recover damages due to acts of the company on a different parcel of land, causing additional or different injury from the damages due to the acts of the company on the land granted.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 546.]

9. Railroads (§ 114 (4)*)—Damages—Jury Question.—Where plaintiff, who granted a railroad company a right of way, claimed that the residue of her property was injured by an embankment constructed by the company on other lands, held, that the question of the amount was for the jury.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 116.]

10. Railroads (§ 113 (8, 9)*)—Injuries from Construction—Release—Effect of Deed.—That a landowner granted a railroad company a right of way over her property did not operate as a release of a claim of damage due to the change by the railroad company of a public road which ran along the residue of the land retained.

[Ed. Note.—For other cases, see 11 Va.-W. Va. Enc. Dig. 546.]

11. Eminent Domain (§ 243 (2)*)—Award—Conclusiveness—Damages Included.—Where a railroad company condemned a right of way over land in which plaintiff had only a life estate, held, under Code 1904, § 1105f, subsec. 23, that the award in such condemnation proceedings did not bar plaintiff's action for the recovery of damages to other property of which she owned the fee, though the requisite notices were given, unless the commissioners considered and passed upon the damage to such land.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 106; 11 Va.-W. Va. Enc. Dig. 546.]

12. Eminent Domain (§ 243 (2)*)—Award—Conclusiveness—Matters Considered.—The commissioners' report, in proceedings by a railroad company to condemn a right of way over land in which plaintiff had a life estate, held not to show that damages to other property which plaintiff owned in fee, due to the construction of the railroad, were passed upon and determined, and hence such award of damages did not, under Code 1904, § 1105f, subsec. 23, bar recovery.

[Ed. Note.—For other cases, see 5 Va.-W. Va. Enc. Dig. 106-107.]

*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

Error to Circuit Court, Appomattox County.

Action by Dora E. Pamplin against the Norfolk & Western Railway Company. Judgment for defendant, and plaintiff brings error. Reversed and remanded for new trial, with directions.

A. S. Hester, of Lynchburg, for plaintiff in error.

F. S. Kirkpatrick, of Lynchburg, for defendant in error.

TROTTER *v.* E. I. DU PONT DE NEMOURS & CO.

March 13, 1919.

[98 S. E. 621.]

1. Pleading (§ 252 (2)*)—Amended Declaration—Effect of Former Declaration.—Where case was tried on the second amended declaration, which was intended as a substitute for the first two declarations, the case stood as though the first two declarations had not been filed, and allegations therein with reference to how accident happened did not bind plaintiff.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 348.]

2. Appeal and Error (§ 866 (2)*)—Ruling on Demurrer to Evidence—Review.—The trial court having sustained defendant's demurrer to plaintiff's evidence, the court on appeal will only consider whether a verdict for plaintiff, if found, would be set aside as without evidence to support it.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 576; 4 Va.-W. Va. Enc. Dig. 540.]

3. Appeal and Error (§ 927 (5)*)—Ruling on Demurrer to Evidence—Review.—In determining whether demurrer to plaintiff's evidence was properly sustained, court on appeal must admit the truth of plaintiff's evidence and all inferences therefrom, favorable to the plaintiff, which the jury might have fairly drawn.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 522.]

4. Trial (§ 139 (1)*)—Demurrer to Evidence.—If verdict for plaintiff would not have been set aside as without evidence to support it, demurrer to plaintiff's evidence should have been overruled.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 536.]

5. Master and Servant (§ 286 (17)*)—Negligence—Question for Jury.—In action for injuries to plaintiff servant, due to falling of a scaffold which he was using in the course of his employment, and which had been erected by defendant master, question of defendant's negligence held for the jury.

[Ed. Note.—For other cases, see 9 Va.-W. Va. Enc. Dig. 726.]

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